United States Court of Appeals

for the Second Circuit



APPELLANT'S BRIEF

SEP 24 1975

75-7332

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United States Court of Appeals

For the Second Circuit

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS,

Plaintiff-Appellee,

vs.

CLARK-SCHWEBEL FIBER GLASS CORPORATION

and

BURLINGTON INDUSTRIES, INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF OF DEFENDANT-APPELLANT CLARK-SCHWEBEL FIBER GLASS CORPORATION

UNITED STATES COURT OF APPEALS
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BRIEF OF DEFENDANT-APPELLANT CLARK-SCHWEBEL FIBER GLASS CORPORATION

Preliminary Statement

This is an appeal by defendants Clark-Schwebel Fiber Glass Corporation and Burlington Industries, Inc. from a judgment entered on November 22, 1974 pursuant to a jury verdict after four weeks of trial before the Hon. Charles H. Tenney, United States District Judge for the Southern District of New York. Judge Tenney's opinion, filed May

2, 1975, denying defendants' motions for judgment n.o.v. or for a new trial, is unreported. It is reproduced in the joint appendix (R. 288).*

Statutes Involved

Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2 and Section 4 of the Clayton Act, 15 U.S.C. §15, are set forth in Appendix A hereto.

Issues Presented for Review

1. Whether a verdict finding a conspiracy between defendants to drive plaintiff out of business in violation of the Sherman Act can be sustained when the proof showed only exchange of credit information among plaintiff's suppliers and dissimilar action by each to secure payment of its overdue accounts.

2. Whether a verdict of proximate causation can be sustained when the proof showed that it was plaintiff's poor sales and loss of its factoring arrangement which led to its bankruptcy.

3. Whether errors in the charge, acknowledged by the lower court, relating to the crucial conspiracy issue require a new trial.

4. Whether other prejudicial errors in the conduct of the case require a new trial, specifically:

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* Preparation of the joint appendix herein has been deferred pursuant to stipulation of the parties. Appropriate references to the joint appendix will be inserted when completed. For purposes of identification in this proof, pleadings will be identified by the designation "R" and the document number from the Index to the Record on Appeal, references to the trial transcript by the abbreviation "Tr.", plaintiff's trial exhibits and defendants' trial exhibits by the designations "PX" and "DX" respectively.

(a) Whether it was error to permit the trial of an added charge of price fixing on a different product together with the original alleged conspiracy to drive plaintiff out of business when the obvious purpose of the added charge was not the recovery of damages but to create a bias or prejudice against the defendants, one of whom had never sold the allegedly price-fixed product to plaintiff;

(b) Whether the unexpected limitation of the summations of counsel for the two appellants to less than 10 and 15 minutes each, after a four-week case in which defendants had put in their case primarily through cross-examination, was improper;

(c) Whether under the circumstances, after several expressions of confusion on the part of the jury during the 4½ days of deliberation, a mistrial should have been granted.

5. Whether an untrebled damage award of $531,000, based on hypothetical and speculative proof, for a company that had a negative net worth and a history of losses can be allowed to stand.

Statement of the Case

Proceedings Below

This action seeking treble damages under the antitrust laws was filed on December 9, 1966 by Textura, Ltd., its wholly-owned subsidiary, Fenestra Fabrics, Inc., and Malcolm G. Powrie, Textura's 50% shareholder and principal operating officer. Named as defendants were Burlington Industries, Inc., Clark-Schwebel Fiber Glass Corporation, and J. P. Stevens & Company, Inc. Plaintiff Textura

alleged that it was in the business of converting decorative fiberglass fabrics into draperies (R. 1, ¶5)*; that defendants were its principal suppliers (R. 1, ¶15); and that they had conspired to drive Textura out of business (R. 1, ¶24). Among several alleged co-conspirators on this count were L. F. Dommerich & Co., Textura's factor (R. 1, ¶12).

Plaintiffs also asserted claims of monopolization of the decorative fiber glass industry by defendants (R. 1, ¶25), of price-fixing decorative fabrics sold to Textura (R. 1, ¶19), and of quality and credit discrimination in violation of the Robinson-Patnam Act (R. 1, ¶¶31-32). Alleging secondary harm to Fenestra and Powrie based on the same claims, plaintiffs sought treble damages in the amount of $9,450,000, later increased at trial to $50,719,000, untrebled (PX 873).

From the commencement of the action, plaintiffs sought discovery as to claimed price-fixing in industrial fiber glass fabrics. (A government information charging such price-fixing had been filed in 1964 to which the three defendants and others had pleaded *nolo contendere*. That information specifically excluded decorative fabrics from its ambit (PX 866, ¶1)). However, after initial attempts at such discovery was ruled irrelevant in this case, plaintiffs in December 1967 amended the complaint to allege that Textura had in fact purchased a small amount of industrial fabrics from defendants Burlington and Stevens. (By this

* Decorative fiber glass fabrics are used primarily for curtains and draperies, where esthetic considerations are important (Tr. 1014). Industrial fabrics, on the other hand, have different uses such as: golf clubs, conveyor belts, boats, fishing rods, submarines, space crafts, missiles, cable wrappings and reinforced plastics (among others), where tensile strength, temperature resistance, thickness and similar factors are important (PX 866, ¶10, Tr. 1015-16). Decorative fabrics are designed and sold according to the requests and specifications of the individual customer (Tr. 338-39); whereas industrial fabrics are manufactured and sold according to a standard set of government specifications (Tr. 1015, 1141-42).

time, Textura had gone into bankruptcy, and its Trustee, Carlyle Michelman, was substituted as a plaintiff.) Defendants' answers to the amended complaint each set up a counterclaim of fraudulent inducement of credit and sought as damages the amounts owing from Textura for goods sold when it went into bankruptcy and punitive damages. In addition to Textura and Powrie, Vernes F. Grafstrom, Textura's other shareholder, was named a defendant on the counterclaim.

At the completion of discovery, defendants moved for a separate trial on the industrial price-fixing claim on the ground that introduction of evidence on that claim before a jury would be prejudicial to the fair trial of the decorative claims, particularly as Textura's purchases of industrial fabrics had been *de minimis*. This motion was denied without opinion, as was defendants' subsequent motion for a preliminary hearing to consider the industrial price-fixing claim outside of the presence of the jury.

Trial commenced on October 15, 1974. On opening statement, defendants stated that they would not dispute liability with respect to industrial price-fixing (Tr. 58); nevertheless, the court permitted lengthy testimony throughout the trial regarding this matter (e.g., Tr. 921-65). At the conclusion of plaintiffs' case on November 6, the Court dismissed the claims of plaintiff Fenestra and the charges that defendants had conspired to fix the price of decorative fabrics (Tr. 1992, 1997). Plaintiffs withdrew their claim of violations of the Robinson-Patman Act and of monopolization under Section 2 of the Sherman Act (Tr. 1987). Even though plaintiffs had introduced evidence of total purchases of less than $2,500 of industrial fabric from Burlington and Stevens (none from Clark-Schwebel), the

Court denied defendants' motion that this negligible but prejudicial claim not be submitted to the jury. While later remarking that "on the basis of the pre-trial order I should toss the plaintiffs' case out" (Tr. 2165), the Court also reserved decision on defendants' motions to dismiss Textura's claim of conspiracy to drive it out of business and to dismiss Powrie.

Defendants called their first and only witness on Thursday morning, November 7. At mid-day, Judge Tenney was obliged to leave due to a personal emergency (Tr. 2081; R. 288, p. 5). Defendants' one witness was completed with Chief Judge Edelstein presiding, pursuant to stipulation of the parties (Tr. 2069); and the case was adjourned until Judge Tenney's return on Monday. Upon his return, after remarking that "I am not supposed to be here" (Tr. 2146), Judge Tenney attempted to have completed defendants' case, summations, and the charge completed on that day (Tr. 2156), although plaintiffs had taken almost three weeks to put in their case. In an effort to "get through" on Monday, Judge Tenney, without warning limited the summation of counsel for Clark-Schwebel and Burlington (but not of counsel for Stevens) to less than ten and fifteen minutes apiece, respectively. Plaintiffs' summation then consumed more than two hours, and the jury was excused. The jury was charged the next morning, and Judge Tenney left the courthouse at Tuesday noon.

The jury deliberated the remainder of the week, and came in with a verdict on the following Monday afternoon, having been out a total of four and one-half days. During its deliberations the jury on numerous occasions requested that portions of the trial testimony be read and on five occasions asked for clarifications of the Court's charge,

including three separate requests for elucidation of the law of conspiracy (Tr. 2400, 2401, 2414). Chief Judge Edelstein took the jury's questions, but declined to reread the conspiracy charge given by Judge Tenney to which defendants had excepted and instead read a charge of his own (Tr. 2429-32). On the fourth day of the jury's deliberation, defendants moved for a mistrial on the grounds that the jury's questions evidenced a lack of basic comprehension, particularly of the law of conspiracy (Tr. 2408). The motion was denied by Judge Edelstein.

The jury found that Clark-Schwebel and Burlington—but not Stevens—had conspired to drive Textura out of business and fixed single damages in the amount of $531,617.* With respect to industrial price-fixing, the jury fixed damages in the untrebled amount of $99.60. Judgment was entered on November 22, 1974 (R. 309), and motions of Clark-Schwebel and Burlington under Rules 50 (b) and 59 were filed on December 2, 1974 (R. 269). These motions were denied in a memorandum opinion dated May 2, 1975 (R. 288). Defendants' notice of appeal was timely filed on May 30, 1975 (R. 291).

Statement of Facts

The Parties

Textura was engaged in the business of converting decorative fiber glass fabrics and other decorative fabrics into draperies for installation in office buildings and homes. It was the successor of Glass Fabrics, Inc. which had commenced business in April, 1954 (Tr. 83), and had transferred its assets to Textura in 1965 (Tr. 117-18) (refer-

* The jury returned a verdict against Powrie and also against defendants on their counterclaims. No appeals have been taken on these issues.

ences herein to Textura include Glass Fabrics). The operating head of both companies and plaintiff's principal witness at trial was Malcolm G. Powrie.

Defendants Burlington, Stevens and Clark-Schwebel were the principal suppliers of decorative fiber glass fabrics to Textura during the period in suit (Tr. 122-24). While Burlington and Stevens are large diversified textile concerns, Clark-Schwebel's sole business is the weaving of fiber glass fabrics, both industrial and decorative (Tr. 885-86). Also, unlike the other two defendants, it is a relatively new company, having been formed in 1960 (Tr. 891). From 1960-64, its President was Mr. Clark; when he died in October 1964, Mr. Schwebel succeeded him. During the period relevant to the suit, Mr. Ray Nordheim was the head of Clark-Schwebel's Decorative Fabric Division (Tr. 1132).

Summary of Basic Facts

Throughout its existence, Textura by Powrie's own admission was a "financially thin" company (Tr. 645). It chronically was in a deficit working capital position (DX BG, Tr. 2046-47, 2062),* having made a profit greater than $8,000 in only three of the twelve years of its existence. It had an overall loss for the period 1954 through 1965 of nearly $60,000 and a loss of $125,000 for the years 1964 and 1965 alone (DX B). The history of the dealings of each defendant with Textura evidence a long period of forbearance, of each attempting to work with Textura in its

* Textura's audited figures for year end 1964 show a negative working capital of $98,650 (PX 20) and a negative figure of $50,900 for year end 1965 (PX 36).

own way in the hope that Textura would eventually become successful.*

One of the ways defendants worked with Textura was not to insist upon the terms of sales contracts regarding shipment of goods woven specially for Textura on the scheduled delivery date; while Powrie "appreciated" his favorable terms (Tr. 645), he nevertheless took advantage of the situation and failed to request shipment of goods for long periods of time, despite repeated requests to do so (DX T, AD and AE). At the same time, Textura made numerous complaints regarding the quality of goods shipped against all its suppliers and sought to obtain allowances for the alleged quality defects (Tr. 979, 1488). While Textura was always satisfied with the adjustments given to it by Burlington and Stevens, it was not satisfied with Clark-Schwebel's handling of its claims (Tr. 653).

The pivotal event in Textura's relationship with Clark-Schwebel was Powrie's unilateral assertion by letter dated February 24, 1966, of the right to a $30,000 credit against its accounts payable to Clark-Schwebel because of alleged quality defects (DX AJ). Clark-Schwebel reacted quickly to this arbitrary action by the one customer for which it had always "bent over backwards" (Tr. 1528) and billed Textura on March 1 for all goods woven and ordered but not yet called out (approximately $90,000). Clark-Schwebel also put Textura on a cash basis for all future purchases, pending resolution of the dispute.

* Thus, for example, Clark-Schwebel encouraged Textura's efforts to sell directly to building contractors, by issuing credits (Ex. AA and AB) to help finance the publication of one of Textura's selling tools, a book called the Engineers Guide (PX 1); by writing laudatory letters to such contractors (DX AC), and by helping to arrange for cash contributions for promotional purposes from P.P.G. Industries, Inc., a manufacturer of fiberglass yarn (Tr. 1539-40).

The first information received by Burlington regarding the controversy between Clark-Schwebel and Textura was on June 8, 1966 (PX 130), when Clark-Schwebel and Textura were each about to invoke the arbitration clause of their contracts to resolve the dispute. Burlington (and Stevens) evidenced a natural and justified concern for the viability of "financially thin" Textura, should it lose the arbitration and have to pay Clark-Schwebel $90,000. Textura was, however, able to reach a settlement of its dispute with Clark-Schwebel (PX 166) and acknowledged in writing a debt of some $70,000 (DX G). However, Textura never paid more than $5,000 called for by that agreement (Tr. 792), and continued to purchase goods from Clark-Schwebel in 1966 only on a cash basis (DX CK). In contrast both Burlington and Stevens continued to extend not less than 60 days credit to Textura throughout 1966 (Tr. 652, 743, 2154-55).

In the meantime, Textura's factor, Dommerich, had determined for reasons of its own to terminate its factoring arrangement with Textura and, as protection for sums advanced, built up a large cash reserve in Textura's account in July and August, 1966. This action by Dommerich deprived Textura of the cash it needed to operate (Tr. 461-62) and, after Textura was unable to find a substitute factor, led to its going out of business in December, 1966. Twice at the end of plaintiffs' case the District Court ruled that there was no evidence that Dommerich had participated in a conspiracy with defendants (Tr. 1744-45, 1808-09).

A. Background—Credit Terms of Textura With Clark-Schwebel

Plaintiff claimed that the alleged conspiracy to drive it out of business commenced in March 1966; however, extensive background evidence was received at trial. Textura had been a customer of the Decorative Divisions of Burlington and Stevens since 1954 (Tr. 123); in 1961 on after Clark-Schwebel was formed, Textura became a customer for Clark-Schwebel's decorative fabrics as well (Tr. 124).

All purchases of fabric from Clark-Schwebel (except for the initial sample purchase) were by contract individually negotiated between Powrie acting for Textura and Nordheim acting for Clark-Schwebel. These contracts contained standard conditions of sale on the reverse side, and on the front contained a description of the particular fabric purchased, the price, and a delivery schedule. In addition, each contained the standard notation "Net 30" as the credit terms (PX 63, Tr. 161).

At trial, Textura claimed that despite the terms of the contract, it did not have to pay within the "net thirty" day provision of its contracts with Clark-Schwebel (Tr. 163-64, 175), and secondly, that it did not have to call out the goods for delivery in accordance with the delivery dates in the contract (Tr. 133-34, 175). It is the alleged withdrawal of these extended terms which is at the basis of plaintiff's claim relating to the events in 1966.

As to both aspects of the alleged "extended terms" understanding, plaintiff proved no more than that although Clark-Schwebel had repeatedly requested Textura to pay its bills more promptly, Clark-Schwebel had, prior to 1966,

not strictly enforced the terms of its written contracts with Textura. As Nordheim testified:

> "We bent over backwards with this particular account, and it is the only account we bent over backwards with, to accommodate and help him." (Tr. 1528)

The record shows that commencing in 1963, there were at least a half dozen letters and telegrams from Clark-Schwebel urging Textura to bring its account up to date (DX Q-V).* There is no evidence in the record of any response by Textura, except for an occasional acknowledgment that money was indeed owed (DX X), nor any denial that in fact Clark-Schwebel had a right to demand that its account be paid more quickly. Indeed Powrie testified that he considered it a "good business practice" for the defendants to attempt to have sums owed to them paid more quickly (Tr. 763-65).

In addition, Clark-Schwebel made several requests that Textura remove the goods from Clark-Schwebel's warehouse more quickly (DX T (Feb. 25, 1965); DX AD (July 22, 1965); DX AE (November 24, 1965)). Powrie acknowledged on the witness stand that Textura had an obligation in fairness to call in the goods within a reasonable period of time which he conceded was not more than one year (Tr. 774-76).

From the commencement of Textura's doing business with Clark-Schwebel until the end of 1965, Powrie admitted that Textura received these "quite unusually favorable

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* For example, the letter of June 4, 1965 (DX V):

"You indicated that you felt you would be able to pay your bills within 90 days. May I suggest that you send us, each month, one check, keeping your account within a 60 day period. Then, as soon as you are able to help us, we would appreciate it if you would bring your account up-to-date. * * *"

credit terms" (Tr. 769) from Clark-Schwebel which he "appreciated" (Tr. 645, 743); during this five-year period he had never been charged interest by Clark-Schwebel (Tr. 289, 743), nor even asked by Clark-Schwebel for his personal guarantee. This was in contrast to Textura's relationships with other suppliers, each of which had charged Textura interest at times (Tr. 732, 769) and one of which (Burlington) had Powrie's personal guarantee in 1965 and had requested it many other times (Tr. 388, 2045-46, DX N, BE and BF).

At the end of 1965, before the alleged commencement of the conspiracy, when Textura's account payable to Clark-Schwebel had more than doubled to the amount of $64,000 since the end of the previous year (DX BW) and the goods which Clark-Schwebel had in July requested to be called in by the end of the year had not yet been called in (Tr. 781-82),* Clark-Schwebel informed Powrie that, in line with the policy applied to all its other decorative customers, Textura would be charged interest on the account (DX Y). At this time Textura was also notified that future shipments would be held up "until this matter is straightened out" (PX 822). There is no claim nor any shred of evidence that the imposition of interest charges on the Textura account was anything but a unilateral Clark-Schwebel decision. (Textura was given a credit for the interest charges in the settlement agreement (DX G), and indeed the interest charges were never paid.)

In the early part of 1966, prior to the alleged conspiracy date of March 1, some payments were made by Textura to reduce the past due account (DX BX) and some shipments were made by Clark-Schwebel (DX CK). However, Clark-

* Nor indeed, had they been called in by August, 1966 (Tr. 782-83), or December when Textura went into bankruptcy.

Schwebel still held in inventory on March 1 over $85,000 of fabric woven especially for Textura and texturized yarn ordered by Clark-Schwebel to fill specific Textura contracts (PX 104D, 105, Tr. 307-09; 1512).

B. Background—(Burlington, Stevens, Dommerich and Textura)

With respect to Burlington, Textura also claimed that there was an oral understanding of extending credit terms contrary to the language of the written contracts which provided for net 30 days (*e.g.*, PX 804).* The alleged oral agreement was to the effect that Textura would have up to 120 days to pay its invoices (Tr. 154-55).

We refer to the Burlington brief for the details of the background history, but note that there were also numerous attempts by Burlington during the period 1958-65 to obtain prompt payment from Textura, including the request for a personal guarantee in 1964 and, when that was refused, putting Glass Fabrics temporarily on a cash basis (Tr. 2043-2046; DX N; PX 806). Then on April 9, 1965, after Textura had suffered a "staggering" operational loss in 1964 (DX BB), Powrie agreed to and did execute a personal guarantee in behalf of Burlington for that year (DX BC). When Powrie's 1965 personal guarantee expired on December 31, 1965, the Burlington credit department sought its renewal for 1966. Contact with Powrie for such purpose had been made as early as January 5, 1966 (DX BE), well before the alleged conspiracy is said to have commenced.

Powrie claimed a similar understanding, in contradiction to the terms of the contract, with respect to receiving extended credit terms from J. P. Stevens (Tr. 140-

* Some of Burlington's contracts with Textura provided for 60-day terms (DX BO, PX 91, 882).

42). Stevens regularly extended credit to Textura, although on occasion when Textura fell behind, Stevens did threaten to refuse new orders (Tr. 652). Stevens also reduced Textura's line of credit in 1965 when working capital had decreased by about $80,000 over the previous year (DX C). Powrie's testimony was to the effect that Textura's dealings with Stevens were similar to its dealings with Burlington insofar as quality and quality adjustments were concerned, and that he had no complaints regarding the way adjustments were handled by these two defendants (Tr. 653-55).

As Textura's factor, L. F. Dommerich & Company provided a cash flow which the business would not otherwise have had by purchasing accounts receivable from Textura and advancing money to Textura (Tr. 422-23, 425). Up until August, 1966, Dommerich's practice was to make 90% advances against the face amount of an account receivable purchased (Tr. 434-35). Ten per cent (10%) was held as a reserve against bad debts.

C. Quality Dispute Between Textura and Clark-Schwebel

With reference to the quality dispute that finally resulted in the arbitration proceeding between Textura and Clark-Schwebel, the evidence shows that: (1) complaints to Clark-Schwebel had commenced early in the relationship (1961 in fact) and continued throughout the years (Tr. 231); (2) in the early years Powrie had presented his complaints to Clark who was a personal friend and Powrie had been satisfied with the adjustments (Tr. 234-35); (3) that after Clark's death in October, 1964 Clark-Schwebel's practice of giving Textura credit became more stringent and, according to Powrie, was "unique" among Textura's suppliers (Tr. 784); (4) that no claim was made that Clark-Schwebel's rejection of even the most serious quality claim

was anything else than solely a Clark-Schwebel decision (Tr. 790-91, 2155); (5) that Powrie thought his claims substantiated and Schwebel and Nordheim thought them unsubstantiated (Tr. 980, 1537); and (6) that by June, 1966, Clark-Schwebel and Textura had finally each separately decided to settle this dispute by invoking the arbitration clause of the contract, but Clark-Schwebel "beat Textura to the punch" by filing first (Tr. 668).

D. The Events of March 1-June 8, 1966 (Clark-Schwebel and Textura)

The alleged commencement of the conspiracy was on March 1, 1966. However, there is no evidence in the record of any communication between Clark-Schwebel and Burlington on or about that date, or from that date until June 8, 1966 (PX 130); and not one shred of evidence that any actions Clark-Schwebel took during this period were at all influenced by Burlington or vice versa.

The relationship between Clark-Schwebel and Textura was struck a serious blow by Powrie's letter of February 24, 1966 to Nordheim (DX AJ), stating: "I met with our attorney and reviewed the problem with him", and "We * * * are taking a credit of Thirty Thousand Dollars ($30,000)." Powrie admitted that taking such a credit was contrary to the terms of the contract (Tr. 793-94). Upon receipt of the letter, Clark-Schwebel also referred the matter to its attorney and on March 1 (1) put Textura on a cash basis; and (2) billed it for all the fabrics held by Clark-Schwebel for Textura (PX 106, 108). These acts were simply an assertion of Clark-Schwebel's contract rights.*

* The contract, embodying the traditional "Worth Street Rules" of textile contracts, provides in paragraph 3 for the right of a seller unilaterally to "change or withdraw all terms and limits of credit", to

Clark-Schwebel continued to sell to Textura but maintained it on a cash basis until the latter went out of business on December 15, 1966 (DX CK). There is no evidence that Clark-Schwebel's March 1 decision—surely the critical one in the relationship between Clark-Schwebel and Textura—was anything but a Clark-Schwebel decision.* This was conceded by Powrie (Tr. 790-91). The evidence of record shows that Burlington was not even informed of Clark-Schwebel's placing Textura on a cash basis or the possibility of an arbitration until June 8, 1966 (PX 130). Indeed putting Textura on a cash basis and billing it for prompt payment of full contract amounts was surely inconsistent with the claims of Burlington and Stevens; even the suggestion, therefore, that such conduct was the result of joint action with them is incredible.

No significant changes in the relationship between Clark-Schwebel and Textura occurred after the March 1 letter until June 9: Textura received goods when it paid cash, which it did on occasion, reducing the amount owing (Tr. 307, 1006-07). Part of the period was occupied with the parties' attempt to settle the dispute short of submitting it to arbitration (Tr. 1532, PX 826), an attempt as to which

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"require payment before delivery" and if the account is past due, to take other steps, such as "to defer deliveries", "to declare forthwith due and payable all unpaid invoices", and "bill undelivered merchandise and withhold delivery until payment is received" (PX 814, ¶3).

* Mr. Schwebel's testimony of how this decision came about is uncontradicted:

> "A. Mr. Nordheim and I talked the matter over and we concluded that since he [Powrie] apparently had made the decision to halt what we had hoped would remain reasonable discussions between our companies and had gone to an attorney on the matter, and since he was intending to make a deduction that none of us had agreed to accept, that we had to take restrictive action in limiting our further exposure of open credit and at that point we notified Mr. Powrie that further shipments until the matter was resolved one way or the other, would be on a C.O.D. basis." (Tr. 1116-17)

Powrie admitted Clark-Schwebel took the initiative (Tr. 318). In April, 1966 personal guarantees of Mr. and Mrs. Powrie and Mr. Grafstrom (a wealthy investor and Textura's other major stockholder) were requested by Nordheim and Schwebel as one means of dealing with Textura's delinquent accounts. Neither of the Powries nor Grafstrom acceded to the requests.

During this period, Textura went to Burlington to buy fabrics on credit which Clark-Schwebel would only sell on a cash basis. Thus in the period May-August, Burlington wove 25,000 yards of "Homespun", a fabric previously woven for Textura by Clark-Schwebel, as well as weaving a sample of a second fabric (DX AO, PX 548; Tr. 374-75).

E. The Period June 8-July 29, 1966 (Clark-Schwebel and Textura)

On June 9, 1966, Clark-Schwebel had, after independent investigation of Textura's quality claims, concluded that they were unjustified (Tr. 1537, 1549-50) and pursuant to the contract filed a claim in arbitration (PX 131). Again there was not one shred of evidence that this was anything but a Clark-Schwebel decision. Powrie admitted that he had no evidence to the contrary and further that he would have instituted the arbitration if Clark-Schwebel had not (Tr. 668-71).

There was one telephone conversation between Nordheim and Kelly of Burlington's credit department prior to the institution of the arbitration. According to Kelly's memo of June 8, 1966 (PX 130), Nordheim stated that "Clark-Schwebel is now holding this account to CBD terms [cash before delivery] and is refusing any new orders." The memo is entirely a factual credit information report

and, like the other Burlington memos introduced into evidence, demonstrates the exchange of credit information routinely engaged in by all credit men.

After the arbitration was filed on June 9 (PX 131), there were numerous efforts to settle the dispute between Clark-Schwebel and Textura. Some of these efforts were reported to Burlington by either Powrie or Nordheim. (Powrie acknowledged on the witness stand that he expected his suppliers to be concerned with respect to the progress of this proceeding from a credit standpoint and that their concern would not turn on who had initiated the proceeding (Tr. 663-65)). Thus Kelly reported on June 30, 1966:

> "Mr. Nordheim indicated that he would be very cooperative and will not insist on immediate delivery but will work out any kind of reasonable delivery schedule. He will advise me in the event the arbitration is settled along these lines." (PX 141)

These are hardly words of a man seeking to enlist Kelly and Burlington in a conspiracy to drive plaintiff out of business. Further conversations regarding the status of the dispute took place beween Kelly and Nordheim on July 8 (PX 148) and July 26 (PX 158).

F. The Events of March 1-July 29 (Burlington, Stevens and Textura)

1. March 1-June 8

During this early period, before any credit exchanges between Burlington and Clark-Schwebel, Burlington was continuing with its efforts to obtain Powrie's personal guarantee (DX BF, BK, PX 60, 117). These efforts were intensified on April 25, 1966 when Burlington received a copy of Textura's year-end financial statement for 1965,

showing an operating loss for the year of about $36,000 and a negative working capital of over $50,000 (DX BH, PX 36).

When Textura submitted new contracts to Burlington in March and April, approval was held up by the Burlington credit department pending resolution of the negotiations regarding the personal guarantee (DX AO, BK, PX 115). At the same time, Burlington's sales department was shipping fabrics on pre-existing contracts (PX 829) and indeed had been weaving some new orders on its own risk and without approval of Burlington's credit department (DX BN).

2. June 8-July 29

On June 8, 1966 Burlington first learned that Clark-Schwebel had placed Textura on cash terms and was contemplating an arbitration proceeding involving approximately $90,000 (PX 130). The fact of these proceedings and the possibility that Textura could lose the arbitration gave further concern to Burlington's credit department regarding Powrie's failure to give them a personal guarantee (DX BN).

Stevens too was concerned with the credit situation of Textura in light of the Clark-Schwebel arbitration. As a result, it held up on certain new Textura orders and requested a personal guarantee from Powrie in a letter dated July 21, 1966 (PX 155). Powrie came to New York later in July and, before meeting with Clark-Schwebel, visited Burlington and Stevens (Tr. 378-79). Powrie testified that the credit men from Burlington and Stevens expressed concern over the arbitration and that Schutz of Burlington "said something to the effect that 'Well, of course, Mr.

Powrie, I don't believe we can entertain further open account with our company and yours unless and until you settle with Clark-Schwebel' " (Tr. 382). Significantly, Powrie testified that Knisel of Stevens reacted in stronger terms, telling him that Stevens was "putting the limit on your credit and requiring a guarantee because of the Clark-Schwebel controversy" (Tr. 392).

G. The July 29 St. Regis Meeting; the Settlement Agreement and Subsequent Modifications (Clark-Schwebel and Textura)

The efforts of Clark-Schwebel and Textura to settle the arbitration resulted in a meeting at the St. Regis Hotel on July 29 between Powrie, Grafstrom, Schwebel and Nordheim. The matters discussed at that meeting are embodied in a letter of August 4 prepared by Schwebel and sent to Powrie (PX 166):

> 1. Textura would take in $70,000 worth of goods woven to Textura's order (or of special yarn ordered for Textura) and held by Clark-Schwebel;
>
> 2. Textura would pay the amount due for those goods in three monthly installments of $23,500, $23,500 and $23,000;
>
> 3. Upon payment, Textura would be issued a quality adjustment (and write-off of interest charges) in the amount of $12,426.

Powrie asserted that these terms were very onerous; nevertheless, *on his own testimony* (1) the settlement agreement (PX 166) reached at the St. Regis was never signed by Textura (Tr. 792); (2) Powrie told Schwebel at the meeting that it could not be performed by Textura (Tr. 678)*; (3) it in fact was never performed by Tex-

* Of course, defendants dispute the veracity of this testimony, but in the present context we must assume that the jury believed Powrie.

tura (Tr. 792); (4) it was subsequently twice modified to Textura's benefit at Textura's request (Tr. 672-77); and (5) out of the entire $70,000 obligation spelled out in the agreement, Textura paid a total of only $5,000 (Tr. 792). Thus according to Powrie himself, Textura did not agree to anything, did not perform anything, and paid only a nominal amount.

On August 22, 1966, Textura requested Clark-Schwebel to modify the settlement agreement by providing that the payments specified in the August 4 letter be reduced to $10,000 every two weeks (DX E). Clark-Schwebel acquiesced in that request (Tr. 675). Shortly thereafter, Powrie asked Nordheim to notify Burlington of the modification, which Nordheim did.*

Clark-Schwebel never received any payments under this modified agreement. On September 28 the parties again met and Textura requested and Clark-Schwebel agreed to a further extension of Textura's obligation to pay, so that it would only pay $5,000 a month for 13 months. This was formalized in a letter agreement signed by both parties (DX G). Grafstrom testified as to the negotiations leading to this agreement:

> "Q. Do you recall Mr. Nordheim saying to you at that meeting that 'We could work something out if we tried to be men of good will'?
>
> A. Yes, I think I do recall that and I think Mr. Powrie replied that, 'Let's see some good will on your side.'

* The Burlington memo reads in part as follows: "He [Powrie] told Mr. Schutz that he has asked C-S to telephone us and confirm the foregoing. Mr. Ray Nordheim of C-S telephoned me and advised that he had received a letter signed by Mr. Powrie confirming the foregoing." (PX 548)

Q. Wasn't, in fact, something worked out in that meeting reducing Textura's payments to $5000?
A. Yes." (Tr. 1454).

Despite these modifications, only one $5,000 payment was made (Tr. 677). Clark-Schwebel made some sales to Textura for cash prior to its going out of business on December 15, 1966 (DX CK). As a result of that bankruptcy, Clark-Schwebel was left with an unpaid claim of $72,000, later reduced by virtue of Clark-Schwebel's resale of certain of the goods woven for Textura (Tr. 967-68).

H. July 29-December, 1966 (Burlington, Stevens, Dommerich and Textura)

After reaching the supposed "settlement" with Clark-Schwebel on July 29, Powrie informed both Burlington and Stevens of the settlement—but not of his inability or unwillingness to perform it. Indeed he told them quite the opposite.* By August 25, Burlington's sales department had accepted Textura's orders and the credit department had agreed to go ahead, without a personal guarantee, informing Powrie that "we expect him to pay promptly on 60 days and that his performance as to payments would affect our decision as to whether or not we wish to take future orders" (PX 548). In fact, both Burlington and Stevens extended Textura credit until it went out of business (Tr. 2154-55); however, Textura did not call out many of the

* Mr. Schutz of Burlington's credit department quotes Powrie as having called on August 3, 1966, to report on the settlement with Clark-Schwebel, saying that he would have no trouble conforming to the terms of the agreement and indeed that the goods that he would be required to take under the agreement "were entirely usable by him and would be used this Fall * * *" (DX BO). Similarly, Powrie is quoted as informing Burlington on August 15, 1966, that he could perform the terms of the contract and "believes he will have no trouble in meeting the Clark-Schwebel payments in the next three to four weeks." (DX BP)

fabrics ordered, leaving both companies with substantial yards in inventory, as well as claims in bankruptcy for goods sold and delivered.

For reasons of its own, Dommerich had become disenchanted with Textura, and during the months of July and August 1966 built up an $84,000 cash reserve against Textura's account—in contrast to $26,000 in reserve held in April (Tr. 461-62; PX 532). Dommerich sent notice of termination of its factoring agreement to Textura on August 10, 1966, effective October 1966, but continued to factor the account by virtue of two one-month extensions until Textura went out of business in December 1966 (DX H and I). Powrie testified that Dommerich's building up of its reserves had a devastating effect on his "financially thin" operation in that "we didn't have cash to operate with." (Tr. 461-62)

ARGUMENT

I.

There was insufficient evidence to submit the issue of conspiracy to the jury.

Plaintiff's evidence of conspiracy was wholly insufficient. Defendants maintain that it was error to deny their motions for judgment n.o.v.; that it was error to deny their motion to dismiss at the end of plaintiff's case; and that it was error to submit this case to the jury.

In denying defendants' post-trial motions, the lower court stated without analysis that there was justification for the verdict because of defendants' "similar action" at a time when they were in "communication with each other" (R. 288, p. 2). Defendants do not contest that

they were in communication with each other in the period from June 8 through August, 1966, but we do maintain that such communications were legally protected credit exchanges and that there is nothing in the record which would permit a contrary finding. Defendants do deny that the actions which they took were at all "similar" or "parallel" in substance or detail. No inference of conspiracy is permissible from the insubstantial evidence adduced at trial.

A. The Evidence of Credit Exchange

Plaintiff's case rested largely on its proof of conversations in which Burlington's credit department and Schwebel and Nordheim of Clark-Schwebel, acting as a *de facto* credit department,* discussed the financial status of Textura's account. But it is a long-settled principle that such exchanges of credit information are not prohibited by the antitrust laws. In *Swift & Company* v. *United States,* 196 U.S. 375, 394 n.1 (1905), the Supreme Court enjoined the defendants from certain joint actions with the following exception:

> "But nothing herein shall be construed to prohibit the said defendants * * * from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers * * *."

Similarly, in *Cement Mfrs. Protective Asso.* v. *United States,* 268 U.S. 588 (1925), the Court held:

> "* * * Distribution of information as to credit and responsibility of buyers undoubtedly prevents fraud and cuts down to some degree commercial transactions which would otherwise be induced by fraud * * * we

* Clark-Schwebel did not have a credit department as such (Tr. 1137-38).

> cannot regard the procuring and dissemination of information which tends to prevent the procuring of fraudulent contracts or to prevent the fraudulent securing of deliveries of merchandise on the pretense that the seller is bound to deliver it by his contract, as an unlawful restraint of trade even though such information be gathered and disseminated by those who are engaged in the trade or business principally concerned." *Id.* at 604

Included within the exemption for the exchange of credit information are such consequences "as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or to require cash or security from any given customer." *Id.* at 600.

If credit exchanges and the exercise of judgment on the basis of information received were not permitted, creditors would not be able to protect themselves from fraud by their customers.* See Baker, *Exchange of Information for Presentation to Government Agencies: The Interplay of the Container and Noerr Doctrines,* BNA Antitrust & Trade Reg. Rptr., #704, pp. 1-3, 4-5 (March 11, 1975); *United States* v. *Container Corp.*, 393 U.S. 333, 335 (1969) and *Ruddy Brook Clothes Inc.* v. *British & Foreign Marine Ins. Co., Ltd.*, 195 F.2d 86 (7th Cir.), *cert. denied,* 344 U.S. 816 (1952). This principle was recently recognized by the Justice Department in a business review letter dated July 31, 1975, CCH Trade Reg. Rptr., Letter #193, p. 4 (September 8, 1975).

In an increasingly credit oriented economy, creditors and sellers must have a means of determining the credit

* It was admitted by Powrie that Textura, at his direction, deliberately overstated its income in the year 1966 in its so-called "internal" monthly statements given to its suppliers, and did not advise its suppliers of the overstatement (Tr. 866-67).

standing of their accounts or customers without subjecting themselves to antitrust penalty. To allow a jury to infer an illegal agreement based on evidence such as was presented here, would eliminate defendants' rights and the rights of all suppliers to exchange credit information and to act responsibly on the information so received. The exception from the antitrust laws relating to exchange of credit information would be of no practical benefit.

B. The Evidence of "Similar" Action

Plaintiff also sought to rely on supposedly similar actions by defendants. Its contentions find support in neither fact nor law. As this Court has recently declared, parallel action is not sufficient to find a Section 1 violation "even if [defendants] knew the other companies were doing likewise." *Modern Home Institute* v. *Hartford Accident & Indemnity Co.*, 1975 Trade Cases ¶60,216 at p. 65,846 (2d Cir. 1975). Moreover, the evidence of similar or parallel conduct by Clark-Schwebel and Burlington was attenuated to the point of nonexistence. Indeed, if one searches for parallel conduct, the actions of defendant Stevens, which the jury exonerated, bear a close similarity to those of defendant Burlington; and both Stevens' and Burlington's actions were quite different from those taken by Clark-Schwebel.

The Court below suggested, without reference to the factual record, that parallel behavior took place with respect to "restrictions of Textura's credit, cessation of deliveries, refusal to process orders and demand for personal guarantees." (R. 288, p. 3). The record does not support this statement.

It was only Clark-Schwebel which was involved in a quality dispute with Textura; it was only against Clark-

Schwebel that Textura asserted a unilateral $30,000 credit; it was only Clark-Schwebel that put Textura on a cash basis and billed it for all goods under contract. These actions were all taken in March 1966, and Burlington and Stevens did not become aware of them until two months later. When Burlington and Stevens did learn of the Clark-Schwebel arbitration claim of $90,000 against Textura, this added to their already serious concern about Textura's viability; nevertheless, both extended credit throughout 1966 (Tr. 652-53, 743, 2154-55) and continued to make deliveries on credit until December, 1966, when Textura went out of business.

After March 1, Clark-Schwebel did not weave any new fabrics while waiting for Textura to pay for and call out the goods already woven, and Clark-Schwebel delivered goods to Textura only against cash payments (DX CK). On the contrary, Burlington did weave and deliver goods on credit so long as Textura paid within 60-day terms (PX 806, 829, 548).* While Clark-Schwebel determined on March 1 to bill Textura for goods woven for it but not called out, Burlington never did bill Textura for goods not called out.**

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* There was one hiatus in Burlington's delivery of two specific fabrics to Textura resulting from a credit department delay in giving Textura approval which was in turn caused by Powrie's procrastination and ultimate refusal to sign a personal guarantee (DX BK, AO). Thereafter, in late August, the orders were approved and in September through November, these fabrics were woven and delivered to Textura. The decision to hold up approval was made in May, well before Burlington's conversations with Clark-Schwebel regarding the status of this account beginning on June 8 (PX 130). Other Burlington fabrics were being delivered during this period (PX 829).

** Thus on June 30, 1966, Burlington noted that Textura also had not called in 10,000 yards of fabric on a contract to have been completed by March of 1966, but the "sales department feels they will give the customer until about 9/30/66 before considering billing [these goods]" (DX BN).

When Clark-Schwebel put Textura on a cash basis, Textura requested Burlington, and Burlington agreed, to weave and sell the style "Homespun" previously woven by Clark-Schwebel for Textura (DX AO; Tr. 632). Thus, the situation could be likened to an attempt to prove price fixing by "conscious parallelism" when supplier A raises prices by 10 cents per lb., and supplier B raises prices by one cent per lb., and supplier B takes over some of supplier A's business. Such proof is not sufficient to make out a *prima facie* case. *A.P. Hopkins Corp.* v. *Studebaker Corp.*, 355 F.Supp. 816 (E.D. Mich. 1972), *aff'd* 496 F.2d 969 (6th Cir. 1974).

There was no proof of similar conduct with respect to personal guarantees. Burlington had requested a guarantee in several previous years, had obtained such a guarantee in 1965, and continually sought its renewal in 1966 starting in January. Clark-Schwebel made one demand for a guarantee in April of Mr. and Mrs. Powrie and of Grafstrom (Tr. 313-14). There is no evidence that Clark-Schwebel even knew of Burlington's efforts to obtain a guarantee prior to the time Clark-Schwebel sought one (Tr. 995). Conspiracy can hardly be inferred from an action which Powrie called the "knee jerk reaction of a credit man" and what is clearly a natural consequence of the questionable credit standing of an account (Tr. 730). Moreover, the issue is a total red herring as neither the Powries nor Grafstrom ever gave Clark-Schwebel any personal guarantees.*

* In addition to the items referred to by the District Court, plaintiff argued that defendants jointly forced Textura to enter the settlement agreement with Clark-Schwebel. There was no such evidence. Clark-Schwebel informed Burlington and Stevens with respect to the arbitration and its settlement, and Powrie testified that he felt "under pressure" from his suppliers to settle when he went to the St. Regis meeting on that date (Tr. 397-8). That is the long

(footnote continued on next page)

Even when similar actions are taken, if consistent with the self-interest of the actors, such actions cannot create an inference of agreement or conspiracy. "Conscious parallelism is meaningless, and in no way indicates agreement, in the absence of some evidence that the parallel decisions of the alleged conspirators were contrary, on the hypothesis of independent individual decision, to their apparent individual self-interest." D. Turner, *The Definition of Agreement*, 75 Harv. L. Rev. 655, 681 (1962). *A fortiori*, as plaintiffs here were not even able to prove parallelism, plaintiffs' "proof" of conspiracy was not of such a nature to be submitted to the jury.

This Court recently considered these questions *in extenso* in *Modern Home Institute* v. *Hartford Accident and Indemnity Co.*, 1975 Trade Cases ¶60,216 (2d Cir. 1975). There this Court affirmed summary judgment against plaintiffs, over the assertion that parallel behavior by defendant insurance companies (and 24 others) in refusing to purchase a service offered by plaintiffs gave rise to an inference of agreement between them.

The Court held that parallel behavior alone is not sufficient to find a Sherman Act §1 violation—"even if they knew the other companies were doing likewise." *Id.* In *Modern Home*, each of the defendants had come forward with evidence that it had rejected plaintiffs' proposal for independent business reasons; at that point, this Court held, it was incumbent upon plaintiffs to respond "with an

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and short of the evidence on the subject and the fact that Powrie may have felt under pressure cannot change the objective facts that there was no evidence of pressure or of any agreement or plan to put him under pressure. Moreover, since Powrie testified that he felt under pressure from both Burlington and Stevens and the evidence as to the former is not any less tenuous than as to the latter, a jury verdict against Burlington and in favor of Stevens based on this theory would have to be set aside as inconsistent.

offer of evidence that would raise material factual issues * * *'' with respect to the reasons for such rejection (*Id.* at p. 65,847). There was nothing in the record below that suggested that Clark-Schwebel put Textura on a cash basis for anything other than its independent business interests. To paraphrase this Court in *Modern Home*:

> ''A company's concern over the possible [uncollectibility of an account] is a legitimate basis for independent protective action on its part, which cannot be viewed as conspiratorial in the absence of some evidence of tacit understanding with competitors.'' *Id.* at p. 65,848.

The legal principles adopted in the *Modern Home* case have been given expression by the numerous other courts. Thus, for example, in *Independent Iron Works, Inc.* v. *United States Steel Corp.*, 177 F.Supp. 743, 746-47 (N.D. Cal. 1959), *aff'd* 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963), where defendants' motions for directed verdicts were granted, the Court said:

> ''In deciding whether evidence of defendants' conduct can reasonably support an inference of conspiracy, there must be more than mere general similarities; *there must be a sameness of conduct under circumstances which logically suggest joint agreement, as distinguished from individual action.* Proof of parallel business conduct is not a substitute for proof of conspiracy, and similar conduct as such, does not establish conspiracy. [cites omitted] 'Reasonable businessmen will act similarly when presented with the same problem'. * * *
>
> *An inference of conspiracy is permissible only where the conduct was adopted by a competitor 'in apparent contradiction to its own self-interest.'* [cites omitted] An inference of conspiracy would only arise from

> similar business conduct if it appeared more to the interest of competitors to adopt different practices." (emphasis added).

See also, *Interborough News Co.* v. *Curtis Publishing Co.*, 225 F.2d 289 (2d Cir. 1955); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199 (3rd Cir. 1961), *cert. denied*, 369 U.S. 839 (1962); *Dahl, Inc.* v. *Roy Cooper Co., Inc.*, 448 F.2d 17 (9th Cir. 1971); *Hallmark Industry* v. *Reynolds Metals Co.*, 1971 Trade Cases ¶73,409 (N.D. Cal. 1970), *aff'd*, 489 F.2d 8 (9th Cir. 1973), *cert. denied*, 417 U.S. 932 (1974) (involving a poor credit risk).

The Court below wrote that defendants' actions in restricting credit "were affected in apparent contradiction to defendants' self-interest and * * * could have been deemed rational only if the other parties [sic] to the conspiracy had agreed to act in a similar manner." (R. 288, p. 3). The Court did not further explain its conclusion in this regard, and the conclusion does not withstand analysis. Indeed it would have been against defendants' economic self-interest had they conspired as charged.* It is hardly in contradiction to self-interest to seek to collect payment for goods sold and, if such payment is not forthcoming, to seek to minimize further bad debt exposure. How can it ever be against a seller's self-interest to seek a personal guarantee from a customer with a poor financial standing? And how can ceasing deliveries, when the customer is behind in his payments, be deemed rational only if other co-conspirators had also agreed to do so?

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* It was stipulated that Clark-Schwebel had a claim in bankruptcy against Textura of $38,740.82 and Burlington a similar claim of $16,156.60 (Tr. 2391).

The self-interest of a supplier is not simply to sell goods, but to collect payment for goods sold.* It does not serve a supplier's self-interest to extend credit further and further just so that increased sales figures can be recorded. The ultimate result of sales on credit to an uncreditworthy customer is a greater risk of unpaid accounts receivable, and ultimately a large (and uncollectible) claim in bankruptcy.

C. The Supposed Other Evidence of Conspiracy

The lower court also purported to find "evidence of motive, constant contact and communication at the time of their similar, if not identical, restrictive conduct, as well as admissions and threats." (R. 288, p. 3). Again, the statement was made without explanation or any reference to the record.

Below, plaintiff argued that defendants had two different motivations: Burlington supposedly wished to drive Textura out of business because it did not like Textura's method of selling direct to contractors, bypassing the middleman; but Clark-Schwebel, which had provided financial support for Textura's selling method, purportedly wanted to drive

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* See in this connection *England* v. *Pan American World Airways, Inc.*, 1970 Trade Cas. ¶73,205 (S.D.N.Y. 1970), where plaintiff airline company, TAL, argued that it was contrary to defendant's Boeing interest in selling more jet planes to refuse to sell aircraft to TAL so the latter could earn money and pay off its debts. Finding the contention "unpersuasive and contrived," Judge Pollack held (*id.* at 88,788):

> "While it is true that Boeing had an interest in being repaid by TAL and was thus anxious to sell jets to TAL and to assist them in financing the purchase, Boeing's overriding concern was to sell the jets to the first airline that could meet Boeing's [financial] requirements. At no point could TAL ever satisfy these requirements and in the May 26th-June 1st period TAL had in fact no financing commitments at all. Clearly contrary to plaintiffs' contentions it was in Boeing's best interest to write off TAL as a possible purchaser."

Textura out of business because it was a contentious account, always complaining about the quality of goods sold to it. It strains the imagination to believe Textura's tendency to assert quality claims provided motivation to Clark-Schwebel for driving Textura out of business. It is at most motivation for not selling Textura goods; but "no elaborate conspiracy such as plaintiff alleges was necessary" for Clark-Schwebel to bring about the supposedly desired results. Compare *Overseas Motors Inc.* v. *Import Motors Ltd.*, 1974-2 Trade Cases ¶75,242 at p. 97,613 (E.D. Mich. 1974).

Underlying plaintiff's theory of motivation is the preposterous assumption that the only way a supplier can avoid doing business with a troublesome customer is to destroy him. Obviously there is an easier way—simply to refuse to do business with such customer. In fact, Clark-Schwebel never stopped selling goods to Textura so long as Textura was able to pay cash for them (DX CK).

Moreover, charges of Clark-Schwebel hostility toward Textura completely ignore the subsequent history of the parties after the July 29 meeting. Then, at Powrie's request, Clark-Schwebel twice modified the agreement, once after a long settlement luncheon with Powrie and Grafstrom in which both parties, according to Grafstrom, evidenced "good will" (DX G, Tr. 1454).

While on the one hand plaintiff contended that Clark-Schwebel was eager to get rid of this "difficult" and "contentious" account, it argued on the other that Clark-Schwebel could not act alone on its feeling for fear of losing the business back to Burlington (or Stevens). This argument was made up out of thin air, without any evidentiary sup-

port. In any event if Textura was so difficult and contentious that Clark-Schwebel preferred not to do business with it, why would Clark-Schwebel care if all of Textura's business went to Burington or Stevens?* Indeed Clark-Schwebel would be better off if its competition had to spend the time and incur the expense of dealing with Textura's contentions rather than trying to sell fabric to other, less difficult accounts.

The Court below also referred to supposed "admissions" by defendants. We can only assume that the Court was referring to testimony of Nordheim regarding credit discussions with Kelly, of which plaintiffs sought to make much below:

> "Q. So it's true that you did call Mr. Kelly on this account more frequently at the time you were instituting arbitration?
>
> A. When you're in trouble what do you do? You protect yourself. (Tr. 1518).

The jury apparently thought this testimony significant, and asked that it be read to them twice. The comment standing alone is without meaning; it was amplified only by Nordheim's later testimony that whenever there was a problem with an account of his, it was his regular practice to discuss that account with other suppliers as a "kind of defensive measure" (Tr. 1527-28). Certainly this snatch of testimony can not be held to prove a conspiracy between Clark-Schwebel and Burlington.

The Court below also referred to "threats". Without any guidance from the Court's opinion we can again only

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* The jury of course found that Stevens was not a conspirator. If we accept plaintiff's motivation theory, however, a conspiracy between Burlington and Clark-Schwebel, leaving all of Textura's business to Stevens, is totally irrational.

guess that this refers to what plaintiff below claimed constituted a threat: that is, Powrie's self-serving testimony regarding a conversation with Nordheim on June 1, 1966 with respect to the arbitration, at which Nordheim is supposed to have said that "we will crucify you." (Tr. 319). Assuming that this was said, there is nevertheless no basis in the record for concluding that this represented anything other than Nordheim's confidence that Clark-Schwebel would win the arbitration in full (Tr. 1523). In fact, Powrie must have foreseen the same consequences for he shortly thereafter agreed to a settlement (although he never lived up to its terms or to the terms of the subsequent modifications he requested).

II.

There was insufficient proof of causation to go to the jury.

Clark-Schwebel respectfully refers to, and incorporates herein, the separate brief of appellant Burlington for discussion of this point.

III.

Errors in the charge require reversal.

An erroneous and prejudicial jury instruction clearly entitles the party prejudiced to a new trial. *A.B.C. Needlecraft Co., Inc.* v. *Dun & Bradstreet, Inc.*, 245 F.2d 775 (2d Cir. 1957). Defendants urge four fundamental errors in the charge:

1. *"One or Two Conspiracies"*. Plaintiffs in their conduct of the case time after time improperly attempted to

link together the alleged conspiracy to drive Textura out of business and the uncontested conspiracy to fix prices on industrial fabrics. See *infra*, pp. 41-44. The Court's charge, rather than limiting the prejudice engendered by plaintiffs' mingling of the two claims on trial exacerbated the prejudice by linking the two matters. References to "one conspiracy" or "the conspiracy" occur throughout the charge (Tr. 2339, 2346-51, 2353).* There were repeated references at Tr. 2349 to "one conspiracy" with

> "Two objects, one, to fix prices on industrial fabrics sold to Textura, and its predecessor, Glass Fabrics, and another, to force Textura and Powrie out of the fiber glass business".

These references were particularly prejudicial in that defendants admitted—as pointed out in the very next sentence of the charge—having engaged in *one* conspiracy. If there was only one conspiracy, then nothing was left for plaintiff to prove except damages.

Defendants excepted to this charge and the Court replied:

> "The Court: I don't believe I stated that. It seems to me I charged restraint and there were two means, by price-fixing and driving Textura out of business.
>
> * * *
>
> The Court: I think you will find two separate conspiracies are mentioned. But at any rate, your contention is noted." (Tr. 2384)

The record clearly demonstrates that, contrary to Judge Tenney's recollection, at several times "one conspiracy" was charged by the Court; in the context of this case, in

* In addition, there are numerous references throughout the charge to the conspiracies in close proximity (Tr. 2332-33, 2339).

particular, this charge was highly prejudicial. (See Points IV A and C *infra.*)

2. *"The Co-Conspirators".* The Court several times referred to Dommerich, Gumbiner and other alleged co-conspirators (Tr. 2333, 2348, 2350), and charged the jury that "It is sufficient if any one of the defendants was engaged in a conspiracy with * * * even a non-defendant co-conspirator." (Tr. 2348). This charge was directly contrary to rulings made by the Court near the conclusion of the trial: (1) barring hearsay evidence relating to Dommerich and Gumbiner on the ground that no sufficient proof had been shown of their complicity in the alleged conspiracy (Tr. 1744-45, 1808-09, 1881-82); (2) informing counsel prior to the charge that he would not give plaintiff's requested charge with respect to Dommerich (Tr. 2162). However, the charge was given (Tr. 2350).

The references to the co-conspirators in the charge were duly excepted to; the Court responded:

> "I don't know quite how to correct it. Well, it's on the record. The exception is on the record." (Tr. 2383)

A charge permitting a finding of conspiracy with third parties was highly prejudicial to defendants; consider only Powrie's testimony that the effect of Dommerich's actions in the summer of 1966 was to deprive Textura of the cash it needed to operate (Tr. 461-62). Defendants were prejudiced not only by the charge itself, but also because they had concluded, when the Court ruled out evidence as to Dommerich, not to call Mr. Moskowitz, President of Dommerich, as a witness or to read the deposition of Mr. Hornickel, Dommerich's West Coast representative. Moreover, Burlington's counsel had relied upon this ruling and the Court's

preliminary advice on the charge in arguing in summation that Dommerich's actions were the cause of Textura's failure (Tr. 2239); the Court's reversal of position was highly prejudicial. *Tyrill* v. *Alcoa Steamship Co., Inc.*, 185 F. Supp. 822 (S.D.N.Y. 1960).

3. *"Parallel or Similar Conduct"*. The charges requested by defendants (R. 318, pp. 8-9, 14-15) and the charge given by the Court on this issue (Tr. 2342-44) are set forth herein as Appendix B. The charge as given only gave passing reference to defendants' business self-interest, and switched the burden of justification to defendants: "* * * you may consider those reasons as tending to refuse the inference that there was a conspiracy." (Tr. 2344).

The Court here did not, as requested, require the jury to find, before returning a verdict for plaintiff, both that there was similarity of conduct and that the defendants acted contrary to their own self-interest. (See *supra*, pp. 30-33). On the facts of this case, no defendant stood to gain by the alleged conspiracy; rather each would lose from such conduct. The charge, couched in misleading generalities, never came to grips with this point or the facts of the case. The same is true of the substitute charge given by Judge Edelstein (Tr. 2429-32).

In *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970), the District Court had given a charge which permitted but did not require the jury to find a conspiracy on the basis of parallel action alone. The Court of Appeals reversed on the ground that the following charge had not been given:

> "Similarity of operation does not prove a conspiracy unless there are circumstances which logically suggest

> joint agreement as distinguished from individual action." 416 F.2d at 84.

The Court of Appeals stated:

> "In this case, appellants strenuously contended that Seagram's and Barton's decisions were arrived at independently. We agree with plaintiff that there is enough other evidence in the case to sustain a finding that they conspired (*i.e.*, agreed, expressly or tacitly) with each other as separately with McKesson. But we also think that the case was close enough to make the instruction highly prejudicial." *Id.* at 85.

Here there was not the "other evidence" that made *Hawaiian Oke* a close case; certainly the same result—judgment for the defendants—must be reached here.

4. "*Exchange of Information*". The Court below gave a charge (excepted to by defendants, Tr. 2384) that the exchange of credit information "does not *alone*" give rise to an inference of conspiracy, but that indeed it "may be considered" in determining whether a conspiracy existed. (See Appendix B hereto). That charge, taken with the charge on similar or parallel conduct, permitted the jury to infer a conspiracy from: (1) the exchange of credit information; and (2) proof of dissimilar actions taken by each defendant in its independent self-interest to protect the collectibility of its accounts. The Court's charge effectively vitiates the exemption of legitimate credit exchange from the antitrust laws. (See Point I, *supra*).

IV.

Errors in the conduct of the case require reversal.

A. It Was Error to Permit the Industrial Fiber Claim to Be Tried and Submitted to the Jury in Conjunction With the Decorative Fiber Claim.

Almost surely the verdict of the jury, totally without evidentiary support, was brought about by the prejudice engendered by the continual references to industrial price fixing. It was at all times clear that the industrial fiber situation in the late 1950s and early 1960s had nothing to do with Textura's going out of business in 1966. This was in fact conceded by plaintiff's counsel at trial (Tr. 1972). Nevertheless plaintiff successfully and prejudicially utilized defendants' *nolo* pleas as the main support for its baseless claims.

Defendants at all times resisted the inclusion of the totally irrelevant but inflammatory issue of industrial price fixing in this case.* When these efforts were unsuccessful, defendants conceded the fact of industrial price fixing on their opening statements (Tr. 58-59, 75) so that no issue as to liability remained; nevertheless plaintiffs' counsel persisted in adducing, over defendants' repeated objections (*e.g.*, Tr. 922, 941, 951-52, 1175-76, 1189-90), lengthy testimony merely corroborative of the admissions made in the opening statements. Finally, when all the evidence was in and Textura had shown purchases of less than $2,500 worth of industrial fabrics, defendants re-

* Defendants opposed the amended complaint on grounds of the *de minimis* nature of the claim (R. 32); moved for a separate trial of this issue before Judge Carter (when the case was assigned to him and trial appeared imminent) (R. 228); and asked Judge Tenney to conduct a preliminary hearing outside the presence of the jury to determine its dimension prior to trial (R. 260).

quested this Court not to submit this negligible but highly prejudicial claim to the jury (Tr. 2158-2160). The request was denied (Tr. 2161), and the jury returned a verdict on this claim of $99.60 untrebled.

The evidence received at trial confirmed defendants' contention that the price fixing issue was not developed for its own sake, but rather for its prejudicial effect. Although plaintiffs called several witnesses and quizzed them at length about the mechanics of industrial price fixing—lest the jury forget what defendants had admitted—they made almost no effort whatever to prove damages, the only issue remaining. No price lists or other economic data were offered in order to lay a foundation as to what the overcharges might have been. The only "evidence" was a very general comment of Mr. Travis of Burlington (Tr. 1400).* Whether or not this was a sufficient foundation for the jury's finding of a 5% overcharge, plaintiffs' reliance on such skimpy proof despite eight years of preparation is demonstrative of their true purpose in pursuing this issue.

Plaintiffs' counsel made every effort to use the admitted price-fixing to best advantage. It was the essential third aspect of counsel's argument on summation, in addition to (1) exchange of credit information (exempted from the antitrust laws) and (2) alleged conscious parallelism (of which there was none); the essence of counsel's argument with respect to price-fixing was: "they did it before, they must have done it again." (Tr. 2270-72).

* "Q. Do you recall, to the best of your recollection, what the percentage increase was for that six-year period?

A. I would—no, I don't recall specifically, but I would think that they would be in the nature of 3 to 5 per cent."

References to price-fixing were the keystone of counsel's argument.* The jury was asked "Are you going to believe the defendants, the price fixers?" (Tr. 2255). On the other hand—and in striking contrast—defendants were forbidden, by virtue of the Court's pre-trial rulings, from attacking the credibility of Powrie and Grafstrom by pointing out that their testimony might be colored by their hunger for treble damages (Tr. 2385-6). See *contra, Bordonaro Bros. Theatres, Inc.* v. *Paramount Pictures, Inc.*, 203 F.2d 676 (2d Cir. 1953).

Numerous cases have made reference to the highly prejudicial impact on a jury of evidence of prior violations. *Monticello Tobacco Co., Inc.* v. *American Tobacco Co.*, 197 F.2d 629, 632 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952); *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.*, 315 F.2d 449, 459-60 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963); *Dart Drug Corp.* v. *Parke, Davis & Co.*, 344 F.2d 173, 185 (D.C. Cir. 1965). The clear teaching of all these cases is that an antitrust plaintiff should be required to prove his own case, and should not be permitted to use a prior trangression for "merely for an aura of guilt or 'to imply new wrongdoing from wrongdoing'." *Monticello Tobacco Co., Inc.* v. *American Tobacco Co., supra* at 632. As was most aptly stated by this Court in the

* Having referred to Schwebel on the opening as "the ring-leader of this conspiracy" (Tr. 6) and "of price-fixing fame" (Tr. 27), on summation after the claim of decorative price-fixing had been dismissed by the court, counsel argued:

> "* * * [Clark and Schwebel] were fellow price fixers. They were the instigators of a conspiracy to fix prices on industrial fabric, and when they left, they set up their own company. But they [Burlington, Stevens and Clark-Schwebel] still talked to each other, worked with each other, and you all know the expression 'honor among thieves': These people were more used to conspiracy and cooperation than they were to competition * * *." (Tr. 2271)

last-named case: "* * * the mere fact of conviction cannot make the major tobacco manufacturers liable for every business casualty in the cigarette field." *Id.* at 631. Here, the prejudice was greatly exacerbated by the Court's charge that there was "one conspiracy." See pp. 36-38 *supra.*

B. The Court's Unexpected Limitation of Summation

Despite the District Court's lengthy justification (R. 288, pp. 4-7) of its limitation of the summation of counsel for defendants Burlington and Clark-Schwebel, the record clearly shows: (1) that those counsel had less than 10 and 15 minutes, respectively, to sum up; (2) that at no time prior to the summations had a formal schedule for summations been established by the Court or had counsel for those defendants been advised that they would have such a limited presentation; (3) that such limitation prevented these defendants from presenting to the jury a coherent picture of their clients' conduct.*

Unfortunately, due to Judge Tenney's personal emergency (R. 288, p. 5), the last few days of the trial were conducted under highly unusual circumstances. Plaintiff rested on Wednesday afternoon November 6 (Tr. 1942); the Court then heard argument on the motion to dismiss, after ascertaining that defendants did not anticipate more than two days of testimony thereafter, depending on how

* This last point is particularly significant as defendants' affirmative case lasted less than one full trial day, in contrast to plaintiffs' case which was before the jury for more than three weeks. Defendants' case was made out in the cross-examination of witnesses called by plaintiffs. It was only on summation that defendants would have been able to pull their case together and present it in a coherent fashion to the jury.

the motion to dismiss was decided (Tr. 1942-43). The Court did not at that time indicate any great haste to complete the case; indeed at that point, the parties were well ahead of the five to six weeks which the parties had estimated for their case (R. 316, p. 27).

In its post-trial opinion, the Court suggests that because counsel for Burlington and Clark-Schwebel did not find it necessary to add anything to the legal argument to dismiss (Tr. 1991), it was led to believe they would not sum up. (R. 288, p. 4) No such conclusion is warranted: while the legal arguments of all three defendants were quite similar, the factual details of their cases were quite different. In a case in which plaintiff alleged parallel behavior, these factual differences were crucial to defendants' case. Thus all three defense counsel cross-examined Mr. Powrie at length (Tr. 612-81[illegible]) about the details of Textura's dealings with their clients, and it was the results of such examination, among other things, that they planned to bring together on summation.*

Resuming on Thursday morning, the Court stated:

> "I assume we can probably finish up today. Whether we will get around to charge tomorrow I don't know." (Tr. 2004)

This statement clearly implied that summations might well last the entire next day, which would not be surprising in

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* Mr. Topkis, counsel for Stevens and lead counsel for defendants had stated to the jury at the commencement of the case:

> "I stand before you representing J. P. Stevens. I don't represent Burlington and I don't represent Clark-Schwebel; they have their separate lawyers and they will address you from time to time." (Tr. 44)

All three defense counsel examined the principal witnesses.

a case of four weeks duration; it also again implied no great haste on the part of the Court.

At noon on Thursday Judge Tenney was called away. The parties agreed to continue before Chief Judge Edelstein that afternoon (Tr. 2069). All three defense counsel examined the witness (Tr. 2007, 2109, 2112).

At the conclusion of the testimony, Chief Judge Edelstein spoke conversationally to all counsel with respect to procedures to be followed when Judge Tenney returned. With respect to summation, he addressed the four counsel: "Certainly you don't expect to take more than three-quarters of an hour apiece, do you?" (Tr. 2139). When plaintiffs' counsel indicated he needed mor time, Judge Edelstein then suggested an hour. The affirmative answer given this rather casual question (asked by a Judge who was sitting in for a different purpose) was not understood by defense counsel as meaning that all three defendants, rather than each of them apiece, would be limited to an hour.

When Judge Tenney returned on Monday, a different mood prevailed:

> "I hope I am going to be able to get through. I am not supposed to be here. * * * See if we can get it all in today. If not, we will try something else." (Tr. 2146-47)

Later that morning when plaintiff's counsel indicated that he assumed that he would "sum up tomorrow", the Court responded:

> "I am suggesting we sum up today. I will charge the jury, if possible today." (Tr. 2156)

This was the first indication any counsel had of a rush to complete summations and charge.

Mr. Topkis commenced summation, noting that he was speaking "with particular reference to the only [defendant] that I represent, namely J. P. Stevens" (Tr. 2168), and indicating that he would leave some matters for the other defendants' counsel to discuss (Tr. 2192). At the luncheon recess, the Court asked whether the other defendants were going to sum up. Both counsel rose and Mr. Hardison representing Burlington but responding for both stated, "Briefly" (Tr. 2207). In the context of this case, neither counsel contemplated that "briefly" meant less than ten minutes to sum up their clients' cases contained in a 2,000 page record. However, when Clark-Schwebel's counsel commenced summing up, he was informed after only a few minutes (6 pages of transcript) that he had two more minutes. At that point in his discussion of the evidence, he had dealt solely with background matters and had only reached the date March 1, 1966 (Tr. 2235), the alleged commencement date of the conspiracy. Counsel for Burlington, in beginning his summation referred to previous counsel's experience, stating that "The pressure is on me to be brief" (Tr. 2237). While the Court in its opinion (R. 288, p. 7) stated that it did not attempt to limit the length of his summation, it did in fact insist that Burlington's counsel close after only 11 pages of transcript (Tr. 2248). Plaintiffs' summation on the other hand consumed 74 pages (Tr. 2250-2322).*

We submit that in a case of this magnitude (plaintiffs' "experts" testified to $50,000,000 in untrebled damages

* Counsel for defendants do not deny that lead counsel, Mr. Topkis, was given an opportunity to speak at length to the jury. However, it was possible (and indeed the possibility came to pass) that Mr. Topkis' client alone would be exonerated by the jury.

(PX 873)), defendants should have been permitted sufficient time to set forth their client's individual positions. As it was, counsel for Burlington and Clark-Schwebel were presented with an unexpected time limitation in the midst of their presentation.

The Supreme Court has recently held that denial of a defendant's right to sum up in a criminal case, even in a nonjury case, violates the Sixth and Fourteenth Amendments. *Herring* v. *New York*, 43 U.S.L.W. 5018 (June 30, 1975). The Court noted in that case the interval of two days which broke into the trial and which "may well have dimmed" the judge's memory. *Id.* at 5021. Here there was not only a trial of four weeks, but an interval of five days between the last witness and the submission of the case to the jury. In *Herring*, the Supreme Court also noted the many inconsistencies in the testimony of the complaining witness which might have been stressed in summation; here, too, defendants had planned to discuss in some detail the inconsistent and at times unbelievable testimony of Powrie as it related to their clients. For the same reasons as in *Herring*, these appellants "through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to [them]" *Id.* at 5022.

C. A Mistrial Should Have Been Granted When Jury Confusion Became Obvious

The jury took an inordinately long time to reach a verdict in this civil case—almost 4½ days. From remarks made in open court, it was clear that it wrestled with the conspiracy problem from Tuesday afternoon to Friday evening. The jurors sent out several notes requesting clarification of the meaning of conspiracy.

The jury's questions themselves reflected confusion. The first note, sent in by the jury when Judge Tenney had left on Tuesday, inquired whether two officers of one corporation could conspire.* On Wednesday night, the jury sent in this rather extraordinary question:

> "Company X is telephoned by Company Y and tells Company X he (Company Y) is holding up credit on Customer A company. Y also tells Company X that Company Z is holding up credit on Customer A. And actions followed that two out of the three companies at the same time period modified their credit arrangement. Is this a conspiracy?" (Tr. 2408)

Chief Judge Edelstein responded by telling the jury that it was up to them to decide that question (Tr. 2409-10). Defendants maintain that these facts alone can not give rise to an inference of conspiracy. (See Point I, *infra*).

On Wednesday afternoon, the jurors had stated privately to Chief Judge Edelstein that "the one issue we have been talking about all this time, we are not positive in our mind what a conspiracy is." (Tr. 2401). Obvious jury confusion is in and of itself a ground for a new trial. *Feeney* v. *Stieringer*, 162 F.Supp. 540, 545 (W.D.N.Y. 1957).

The next evening (Thursday) after eight more hours of deliberation, the jurors again asked for Judge Tenney's charge to the jury on conspiracy to be read (Tr. 2414). Instead, Chief Judge Edelstein prepared a new charge which was read to the jury the next day; the new charge was excepted to by defendants' counsel (Tr. 2428) because it failed to contain the requested language regarding defendants' right to act in their own self-interest (see pp. 39-40, *supra*). Only after eight more hours of deliberation was

* By agreement of counsel, the note was endorsed "No" and sent back to the jury in Judge Tenney's absence (Tr. 2415-16).

there any indication from the jury that a result had been reached (Tr. 2447).*

The length of the deliberations, the obvious confusion in the jury's mind over the meaning of conspiracy and the confusing instructions given the jury all lead inevitably to the conclusion that the motion for a mistrial should have been granted.

V.

Plaintiff's presentation as to amount of damages was so speculative that the verdict must be set aside.

Clark-Schwebel respectfully refers to, and incorporates herein, the separate brief of appellant Burlington for discussion of this point.

Conclusion

The judgment below should be reversed and a judgment for the defendants entered as a matter of law, or, in the alternative, a new trial should be granted.

Dated: New York, New York
September 24, 1975

Respectfully submitted,

WHITE & CASE
Attorneys for Defendant-Appellant
Clark-Schwebel Fiber Glass Corporation

Of Counsel:
HALIBURTON FALES, 2d
THOMAS MCGANNEY
J. MICHAEL BROWN

* The confusion in the jury's mind was documented by its verdict in favor of Stevens, but against Burlington and Clark-Schwebel. There was no rational basis of distinction between Burlington and Stevens on the evidence—both exchanged credit information with Clark-Schwebel and with each other; both took some action in looking over Textura's account, holding up orders for a credit check for a brief period and requesting guarantees, but eventually selling to Textura on credit. In short, a verdict against Burlington and in favor of Stevens is fatally defective as inconsistent.

APPENDICES

APPENDIX A

Statutes Involved

Section 1, Sherman Antitrust Act, 15 U.S.C. §1

Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or

corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 2, Sherman Antitrust Act, 15 U.S.C. §2

Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Section 4, Clayton Act, 15 U.S.C. §15

Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

APPENDIX B

1. Similarity of Conduct

a. Charge Requested by Defendants

If plaintiff has produced no direct evidence of agreement, it may attempt to prove a conspiracy by asking you to draw inferences from defendants' conduct. However, I instruct you that similarity of conduct among various persons does not establish proof of the existence of a conspiracy. Parties may act similarly and yet their actions may not be necessarily directed or controlled by any agreement or understanding between them. It may be in a given case that a defendant and one or more of the other defendants or alleged co-conspirators arrived at the same conclusion entirely independently; it is possible that ordinary business judgment dictates a certain course of conduct, for instance, where a customer is habitually late paying accounts or refusing to give a personal guarantee as security for credit the customer is seeking. It may be such an obvious thing that everybody in that same business feels that it is the only correct action to take to protect themselves individually. In this case, if you find that is the fact, it would not support the finding of an illegal conspiracy.

As I stated, similarity of conduct does not establish the existence of a conspiracy. Moreover, no inference of an agreement, combination, concerted action, or common design among defendants and other alleged conspirators may be made from similar or identical action on the part of two or more of them if such similar or identical action is consistent with each having acted independently. For example, if you find that defendants' request for Mr. Powrie's

personal guarantee is as consistent with each having acted independently and in their own self-interest as with such action having resulted from any agreement among them, you will not consider such requests for a personal guarantee as evidence of any such agreement upon the part of the defendants.

Plaintiff has the burden of proving by a preponderance of the evidence that defendants' actions were contrary to their own independent self-interest. If plaintiff does not sustain this burden, no conspiracy can be found by circumstantial evidence.

* * *

Plaintiff may prove a conspiracy among defendants to drive Textura out of business by restricting its credit by circumstantial evident only if defendants acted similarly and these actions were contrary to their own self-interest.

* * *

If you find that defendants credit actions in 1966 were not similar, then as a matter of law no inference of a conspiracy may be drawn and you must return a verdict for defendants. If you find defendants credit decisions were similar, plaintiff must also prove by a preponderance of the evidence that defendants' credit decisions were contrary to each defendant's own self-interest, before you can return a verdict for plaintiff Textura. However, as a matter of law, if any defendant restricted plaintiff's credit at a time when it had reason to be concerned about Textura's ability to pay, then such action would not be contrary to that defendant's self-interest. Thus, plaintiff must prove by the preponderance of evidence that the defendants' credit decisions were based on some consideration other than Textura's financial condition or ability to pay. (R. 318, pp. 8-9, 14-15).

b. Charge Given by Court

Plaintiffs claim that the defendants acted similarly and uniformly so that, together with other evidence, a conspiracy may be inferred. If you find by a preponderance of the credible evidence that defendants acted similarly or uniformly in their dealings with plaintiffs, then you may consider that evidence in determining whether there was a conspiracy.

However, similar or uniform behavior does not necessarily establish the existence of a conspiracy. Parties may act similarly and yet their actions may be the result of independent judgment. Moreover, the antitrust laws do not prohibit one businessman from adopting a certain course of conduct merely because his competitor has already adopted the same or similar conduct. So long as a businessman's conduct is arrived at independently and is not the result of an agreement or understanding with his competitor or with others, then you may not infer the existence of a conspiracy. The fact that members of a conspiracy may not have acted similarly or uniformly, however, does not necessarily mean that there was no conspiracy. Members of a conspiracy need not act identically; their activities may be in different directions, so long as all of the activities are intended to contribute to a common end.

* * *

Defendants claim that there was a legitimate business reason for defendants' acts. In considering whether defendants had good business reasons for acting as they did, you must, of course, consider only those facts actually known to defendants at the time they are alleged to have acted. You may also consider whether defendants' claim that they acted for good business reasons is advanced in good faith or whether those reasons were not the real rea-

sons for taking such actions. If those reasons seem not to be advanced in good faith and if they appear to you not to be the real reasons for defendants' acts, these are circumstances from which you may, but need not necessarily, conclude that defendants acted as a result of a conspiracy. Now, if you find that defendants had good business reasons for acting as they did and that defendants are advancing those reasons in good faith, you may consider those reasons as tending to refute the inference that there was a conspiracy. However, if the overall evidence is sufficient to support an inference of conspiracy, the fact that a defendant's activities may be explainable as a reasonable business decision will not justify the defendant's conduct or deprive its act of its illegal character. (Tr. 2342-44).

2. Exchange of Information

a. Charge Requested by Defendants

"* * * However, I instruct you that as a matter of law, the exchange by defendants of credit information, financial conditions or other matters which are related to Textura's ability to pay for goods delivered or sold by defendants does not violate the antitrust laws. Preparation and exchange of such information is a common business practice without which rational credit decisions could not be made." (R. 318)

b. Charge Given by Court

"The exchange of information between the sellers of a product concerning the credit rating or standing of a common customer does not *alone* form a basis for an inference that a conspiracy in restraint of trade was formed. The preparation and exchange of such information is a normal and usual business practice. However, such exchange of information, if you find such an exchange did in fact occur, *may be considered,* along with other evidence, in determining whether a conspiracy existed." (Tr. 2343) (Emphasis added).